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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 412

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

v.

THE STATE HIGHWAY COMMISSION OF KANSAS,
Appellee.

APPEAL FROM THE SUPREME COURT OF KANSAS

REPLY BRIEF FOR APPELLANT

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Kansas City, Missouri,
February 5, 1935.

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REPLY BRIEF FOR APPELLANT

Jurisdiction

Appellee concedes that this Court has jurisdiction to determine the Federal constitutional question presented. The case presents but a single issue, namely, the validity of the statute (and the order of appellee made pursuant thereto) which is challenged on the ground that, as construed by the court below, it violates the due process clause of the Fourteenth Amendment by authorizing the taking of private property without compensation, notice, hearing, or right of review.

Statement of the Case

Appellee makes a "re-statement" of the case at pages 2 to 9 of its brief. While in the main the facts actually set forth in this statement are correct, there are certain inaccuracies which we desire to point out; also, it contains argument and inferences with which we do not agree.

On page 3 of its brief appellee states:

> "Appellee instituted this action as an original proceeding in mandamus in the Supreme Court of the State of Kansas, alleging that the Highway Commission was about to and proceeding to reroute certain state highways and to widen certain other state highways and that it was necessary and in the interest of public safety that at certain points within the state where newly acuired state highway rights of way intersected or crossed the privately owned pipe lines and pole line easements of the appellant, that such lines should be altered and changed by lowering, encasing or removing the same to the outer portion of the newly acquired highway right of way."

This statement is inaccurate in that it fails to point out that appellee's motion for a writ of mandamus was based upon its prior order requiring appellant to relocate and change its transmission lines. The action was grounded upon that order.

Appellee's statement at the top of page 7 of its brief reading:

> "The opinion of the Kansas Supreme Court determines and the record involves not more than two questions, viz. First, whether the statute referred to was intended to apply only to highways existing prior to the poles, piers, wires and abutments or whether it was intended to apply equally to highways to be laid out constructed in the future."

is not strictly correct. The court below determined that the statute was intended to apply to private rights of way

and transmission lines intersected and encountered in the construction of new highways, as well as to such lines actually located upon existing highways.

On pages 8-9 of appellee's brief it is said:

> "As has been stated, the Supreme Court commended the parties on their collaboration in this matter and in the elimination of all questions of fact and appellee submits that it has not been granted the opportunity of alleging and stating the notice, proceedings and hearings which were in fact had before the commission. Appellee here states and frankly confesses that the statement is entirely outside the record—that by reason of the conferences and discussions held between the parties herein the Highway Commission adopted and directed certain changes in the plans proposed by its engineers resulting in a saving to the pipe line company of the sum of $3,205.00."

And on page 28:

> "It was upon consideration of the first two questions that the Commission adopted changes in the proposed plan which resulted in a saving, according to appellant's estimate, of the sum of $3,205.00 and while dehors the record, we frankly state that had not the Commission done this the Supreme Court of Kansas would undoubtedly have ordered the same changes of plan."

While we dislike to refer to matters outside the record, in order that this Court may not be misled we feel that a more complete statement with respect to this subject matter is warranted. When the appellee's plans and specifications were delivered to appellant with directions to comply therewith they embraced a total of seven separate projects for changes in its transmission lines. One of these projects, which was withdrawn by appellee before the mandamus action was commenced, required changes in appel-

lant's pipe line located more than two hundred feet away from appellee's proposed highway. In order to comply with appellee's order it would have been necessary that a portion of appellant's pipe line be lowered into and embedded in solid rock at an estimated cost of $3,205.00. Before its mandamus proceeding was filed appellee withdrew the part of its order relating to this one particular project. So far as the record shows and we are advised no discussion or conference of any kind was had between the parties before appellee made its original order.

The commendation of the parties by the lower court had reference to the preparation of the motion for writ of mandamus and the answer thereto wherein issues of fact were eliminated in order to present a purely legal question. This comment had no reference to anything either in or outside the record regarding notice or hearing afforded the appellant prior to the issuance of appellee's order.

On page 9 of its brief appellee says:

> "Appellant's claim of lack of an opportunity to be heard in fact results in a denial to the Highway Commission of the right to be heard on the question of the sufficiency of its proceedings. This is the only possible denial of a hearing now contained in this record."

This is a novel view regarding the procedure to be followed by an administrative body. In order to give the court below jurisdiction and entitle it to grant the relief prayed for, it was of course necessary that appellee's motion for a writ of mandamus contain all allegations of fact requisite to show that the order sought to be enforced was duly and lawfully made. In the words of Mr. Chief Justice Hughes in *Panama Refining Co.* v. *Ryan*, — U. S. —, decided January 7, 1935:

> "• • • due process of law requires that it shall appear that the order is within the authority of the

officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown."

ARGUMENT

1. Nature of the Action in the Court Below

It must be borne in mind that this action primarily involved the question of whether the order of the appellee, alleged to have been made under the authority of Section 16, Chapter 225, Laws of Kansas, 1929, imposed upon the appellant a legal duty to comply therewith.

Under the statutes of Kansas a writ of mandamus may be issued to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust or station. The statute under which this action was brought in the court below is Section 60-1701, R. S. Kansas, 1923, providing as follows:

> "The writ of mandamus may be issued by the supreme court or the district court, or any justice or judge thereof, during term or at chambers, to any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust or station; but though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion."

Appellee's statement (page 10 of its brief), that the action was brought for the purpose of obtaining a construction of the challenged statute, is not entirely accurate. The action was instituted by appellee for the purpose of enforcing its order. The construction and validity of the statute was drawn into question in a consideration of the force, effect and legality of said order. The very nature of the

action shows it was brought to compel the performance of an act which it was contended the law specially enjoins as a duty. Otherwise a mandamus proceeding could not have been maintained.

The action was commenced in the court below after appellee had made its order upon appellant requiring it to make certain changes and alterations in its transmission lines located upon private property. Certain basic facts shown by the record should be kept in mind:

(1) Appellant's transmission lines are located upon private property, and not upon public highways.

(2) Appellant's rights of way upon which its lines are located were acquired long prior to the time when appellee acquired its rights of way for highway purposes.

(3) Appellant's transmission lines constitute property and improvements of a permanent nature.

(4) Appellee acquired from the owners of the fee its rights of way for highway purposes subsequent to and with knowledge of appellant's prior rights of way.

(5) Appellee has neither purchased nor condemned appellant's easements or the transmission lines located thereon so as to subordinate the same to highway uses, nor has it procured the consent of appellant to make changes in said lines and to occupy said easements.

Notwithstanding these undisputed facts, appellee took the position that under the authority of the challenged statute it could occupy appellant's premises without obtaining permission to do so or condemning the property. Appellant urged that the challenged statute could not properly be construed as giving such arbitrary authority to the appellee, and that if it were so construed it would be violative of the

due process and equal protection clauses of the Fourteenth Amendment.

The action was brought and maintained upon the theory that the order of appellee imposed upon appellant a final legal duty to comply therewith. In paragraph 9 of said motion it was alleged (R. 4):

> "That the Highway Commission has ordered and directed said Pipe Line Company to make such changes in the location and design of its lines aforesaid, all as contemplated and provided by R. S. 1931 Supp. 68-415, and has heretofore and on or before December 1, 1933, furnished said company with all necessary plans, specifications and information necessary to enable said pipe line company to proceed to make, accomplish and perform all said changes required by the improvement of said state highways, but that said Pipe Line Company ever since has and now fails, neglects and refuses to conform therewith."

In paragraph 11 it was further alleged (R. 5):

> "That the Pipe Line Company's failure and refusal to make the changes in its lines hereinabove specified in accordance with the orders and rulings and plans and specifications of the Highway Commission are without legal right or authority."

In its prayer for relief, appellee moved and prayed (R. 5):

> "Now, therefore, the Highway Commission moves and prays this court for an alternative writ of mandamus herein ordering and directing the said Pipe Line Company to forthwith move, change, lower and encase its lines at the points hereinbefore stated in accordance with the orders, plans and specifications adopted and approved by the Highway Commission or to show cause why the same should not be done. Plaintiff further prays that upon final hearing that the alternative writ be made peremptory."

The alternative writ of mandamus issued by the court below directed that the changes in appellant's lines be made and completed "in accordance with the orders, plans and specifications adopted and approved by the State Highway Commission * * *." (R. 6)

The peremptory writ of mandamus issued by the court below as its final order in this case provides (R. 33-34):

> "It is therefore by the court, considered, ordered, and adjudged, that the Panhandle Eastern Pipe Line Company be and it is hereby ordered and directed to forthwith proceed to make and complete in an efficient and workmanlike manner the changes in its lines hereinafter specified in accordance with the orders, plans, and specifications, adopted and approved by the State Highway Commission of Kansas for the improvement of the highways hereinafter referred to: * * *."

It is, therefore, clear that the object of the action was the enforcement of appellee's order. The only issue that was or could have been considered in the court below was the validity of this order.

In the answer filed by appellant it was alleged in paragraph 5 that (R. 8-9):

> "Answering the allegations of paragraph 5 of said motion, defendant admits that plaintiff is engaged in improving, widening, relocating, constructing and reconstructing certain highways in the State of Kansas, and for such purposes has procured rights of way for such improvements from the land owners, but states that plaintiff has not procured consent or permission from the defendant to cross the private rights of way and easements owned by defendant and occupied by its pipe line and telephone line nor to make changes in said lines, although plaintiff's rights of way were procured and acquired with full knowledge of the interests and rights of defendant; * * *."

In paragraph 9 appellant stated (R. 9):

> "Answering paragraph number 9 of said motion, defendant admits that the plaintiff has ordered and directed defendant to make said changes in the location and design of its pipe line and telephone line, * * *."

It was further alleged in said paragraph 9, in substance, that appellant's transmission lines are all located upon private property, and not upon any public highway; that the rights of way under which its lines were constructed were acquired from the owners of the fee long prior to the acquisition by appellee of its rights of way, and that appellee had acquired its rights of way with full knowledge of appellant's interest and estate in said lands and of the existence and operation of said transmission lines over and through said lands; that if the challenged statute be given the construction and interpretation placed thereon by appellee it is unconstitutional and void as violative of the due process and equal protection clauses of the Fourteenth Amendment.

The issues thus joined in the court below raised no material questions of fact, but did present the issue of law upon which the parties differed: first, the proper construction of the challenged statute under which the order was made; and, second, its validity against the charge that it violates the due process and equal protection clauses of the Fourteenth Amendment if given the construction contended for by appellee.

That the statute, as construed, does violate the due process clause is shown in appellant's main brief on the authority of an unbroken line of decisions of this Court. Appellant's position is fully supported by the quite recent decision in *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190, cited and discussed in appellant's original brief. Appellee seeks to distinguish that case from this one by asserting

(page 15 of its brief) that the statute there involved "provided that the Highway Commissioner could without notice or hearing determine the requirement of public safety for the elimination of a grade crossing." The statute contained no such provision. The Virginia statute was completely silent with respect to notice and hearing, just as is the Kansas statute involved here. This Court reversed the State court because, as construed, the statute denied due process of law by failing to provide for notice, hearing and right of review.

The statute must provide for notice. The case of *Security Trust Co.* v. *Lexington*, 203 U. S. 323, cited by appellee, does not support its contention. There the action involved the merits of the assessment of certain taxes, and the statute specifically provided for notice to the taxpayer. In its opinion this Court said (page 333):

> "If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute."

2. Nature of the Property which Is Being Taken and Injured is Such that Due Compensation Must be Paid

The transmission lines of appellant are located upon privately owned easements, which were acquired before and are superior to any rights obtained from the owners of the land by appellee. Copy of a typical right of way grant to appellant appears in the record at page 13. The rights appellant acquired thereunder are "to lay, maintain, alter, repair, operate and remove pipe lines and from time to time parallel pipe lines, drips, gates, telegraph and telephone lines and all appurtenances convenient for the trans-

portation of oil, gas or other substances.'? It was under this form of grant that appellant's transmission lines were constructed and are being maintained. Under this grant appellant has a substantial interest in the land in question. The transmission lines constructed on this private right of way are part of an extensive pipe line system of great value. This property cannot be taken for public use without appellant's consent, except by condemnation, and then not without compensation.

On page 49 of its brief appellee says:

> "Were the pipeline company the owner of the fee of the land which it occupies, it might occupy a different position. As it is, it does not assume the burdens of a landowner but occupies easements for its own purposes only. This being so and because the simultaneous occupation of the same land is not inconsistent the private rights of the pipe line company are not dispossessed, they are being merely regulated in order that the traveling public be not endangered."

This is a most extraordinary contention. It is elementary law that the rights of the owner of an easement are paramount, to the extent of the grant, to those of the owner of the soil; as also to a grantee of any subsequent easement. In *United States* v. *Welch*, 217 U. S. 333, this Court held that a private right of way is an easement and is land and that when taken for public purposes the owner is entitled to compensation.

In *United States* v. *Wheeler Tp.*, 66 F. (2d) 977, 983, the United States Circuit Court of Appeals, Eighth Circuit, said:

> "That easements such as these highways are 'property' is not open to dispute. They are interests in land—incorporeal hereditaments. *Mackey* v. *Harmon*, 34 Minn. 168, 171, 172, 24 N. W. 703; *Warner* v. *Rogers*, 23 Minn. 34, 38; *United States* v. *Big Horn Land &*

Cattle Co., 17 F. (2d) 357, 365 (C. C. A. 8); *Combs* v. *Brickhouse*, 201 N. C. 366, 160 S. E. 355, 356; *Boland* v. *Walters*, 346 Ill. 184, 178 N. E. 359, 361; *Eastman* v. *Piper*, 68 Cal. App. 554, 229 P. 1002, 1004; 19 C. J. 863, 29 C. J. 540. Therefore, these highways cannot be taken and their use as such destroyed without compensation under the Fifth Amendment."

In *Village of Bradley* v. *New York Cent. R. Co.*, 296 Ill. 383, 129 N. E. 744, it was held that:

> "In a proceeding by a village to establish a local sewer improvement upon the right of way of a railroad company holding an easement from the original dedicator of the land, where it appeared that a sewer which was to be constructed under the center of the track would interrupt traffic and entail expense in removing the track and replacing it after the work was completed, damages for the interruption of the railroad's business and moving and removing the tracks were recoverable." (Syllabus)

In *Lawlor* v. *Southern Pac. Co.*, (Cal.) 178 Pac. 165, the court said:

> "The law is settled that damages may be recovered for an interference with an easement of right of way whereby property of plaintiffs has been depreciated in value."

In *City of Springfield* v. *Springfield Consol. Ry. Co.*, 295 Ill. 234, 129 N. E. 82, it was held that:

> "An easement is property, and is protected by constitutional provision that private property cannot be taken or damaged without just compensation." (Syllabus)

In *Missouri Pacific Railroad Company* v. *Manson*, 31 Kan. 337, 341, 2 Pac. 800, 803, the court below in passing

upon the nature of the interest of a railway company in its right of way used the following pertinent language:

> "Under condemnation proceedings, a railroad company acquires the exclusive use of the land condemned, so far as it is necessary for railroad purposes, and the original landowner has no right to go upon the land or construct fences thereon, if his action interferes with the use of property condemned for railroad purposes."

In *Paterson N. & N. Y. R. Co.* v. *Mayor, etc., of City of Newark,* 61 N. J. Law 80, 38 Atl. 689, it was held that:

> "The laying out of a highway across a railroad is a taking of the company's property for public use, and entitles it to compensation therefor." (Syllabus)

Also, in *Morris & E. R. Co.* v. *City of Orange,* 63 N. J. Law 242, 43 Atl. 730, the same court held that:

> "Upon the laying out of a highway across the tracks of a railroad company, the latter is entitled to compensation for the use of the locus in quo for a highway crossing." (Syllabus)

In *City of Chicago* v. *New York, C. & St. L. R. Co.,* 216 Fed. 735, the Circuit Court of Appeals, Seventh Circuit, held that the railroad company had a vested right in the streets and could not be required to move its tracks without compensation.

In the rather recent case of *The City of Wichita* v. *Wichita Union Terminal Ry. Co.,* 127 Kan. 855, 275 Pac. 171, a similar statute to that involved here was construed by the court below contrary to the contention of appellee. In that case the city of Wichita enacted an ordinance which declared it to be necessary for the safety and protection of the public that a subway and tunnel be constructed and a pedestrian and vehicular trafficway opened

through the elevated tracks of the railroad company at Waterman Street, and directed the same to be constructed at the expense of the railroad company. The city street had never extended over the railroad right of way at that point. The railroad declined to build such structures and the city commenced a proceeding in mandamus to compel it to comply with the ordinance. In denying relief to the city the court said:

> "There was no evidence on behalf of plaintiff that the street ever extended across the railroad right of way. Because of that fact the trial court took the view that the city could not by ordinance compel defendant to open up a street through its right of way and to construct a subway through its elevated track at that point at great expense to itself and without compensation. In this view we concur. Cities are given authority to condemn private property for public use, and the procedure for doing so, as applied to opening streets, is also provided by statute (R. S. 26-201). In doing this, damages incident thereto must be paid. *City of Osceola* v. *C., B. & Q. R. Co.* (C. C. A.), 196 Fed. 777; *A., T. & S. F. R. R. Co.* v. *Shawnee* (C. C. A.), 183 Fed. 85; *M., K. & T. Ry. Co.* v. *Okla.*, 271 U. S. 303, 70 L. Ed. 957. Plaintiff relies on the authority conferred upon cities by R. S. 12-1633 and 13-1903, but a reading of these sections discloses that they apply only when the railroad is upon or across a public street. Here the railroad had built its improvements on its own right of way and not upon or across any city street." (127 Kan. 857, 275 Pac. 172)

In the present case appellant, the same as the railroad company in the above-mentioned case, had built its improvements on its own rights of way and not upon or across a highway. In the *Wichita* case the statute applied to city streets; in this case to state highways. The reasoning of the above decision is sound, has never been overruled, and should have been followed in the case at bar.

As pointed out in our main brief at pages 29-32 the statute in question provides that the highway commission may acquire by purchase or by the exercise of the right of eminent domain any lands or interests or rights therein and other property necessary for the construction of the state highway system. There is no more reason for appellee taking the property of a pipe line company without compensation than that of a farmer along a projected highway route. As stated by Mr. Justice Roberts in *Liggett Co.* v. *Lee*, 288 U. S. 517, 536: "Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons."

Appellant's contention that its easement may not be taken, damaged or impaired without compensation is fully supported by the authorities. In Lewis on Eminent Domain (3rd ed.), § 223, the prevailing rule with respect to the rights of owners of easements which are taken or impaired for a public use is stated as follows:

> "Such easements cannot be destroyed or impaired by public works without compensation. This principle is well illustrated by the case of *Arnold* v. *Hudson River R. R. C.* (55 N. Y. 661). Arnold was the owner of a factory, with the right to take water from a pond at some distance from his factory and convey it thereto, over the land of another, in a race way or trunk, either over or under the ground. For this purpose Arnold had built and had in use a trunk some six feet above the ground. The defendant, having acquired title to a portion of the intervening lands, took down the trunk, laid it beneath the ground and its tracks, and then raised the water by means of a penstock into the old trunk. Arnold permitted this to be done on the assurance of the company's agent that it would make the water course as good as formerly, and also keep the same in repair. The water power was impaired, and the expense of repairs was increased. It was held that the easement was property within the constitution, and

that the plaintiff was entitled to compensation. The principle of this case will apply to all easements."

3. Appellant is Not Confined to the Argument Advanced in the Court Below on the Same Federal Question

Appellee argues appellant should not be permitted to urge that the statute is violative of due process in a procedural sense because this proposition was not emphasized in the argument in the court below. This point is not well taken. The record presents and we urge but a single federal question. That question is whether the challenged statute, as construed by the court below, violates the due process and equal protection clauses of the Fourteenth Amendment.

In the case of *Dewey* v. *Des Moines,* 173 U. S. 193, two separate and distinct federal questions were argued in this Court. In the court below but one of these questions had been raised. The second question was raised for the first time after the case reached this Court. In passing upon whether this additional question would be permitted to be urged upon appeal, it was said (pages 197-198):

> "Reference to the opinion of the supreme court of the state shows that it was not therein discussed or decided. If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued.
>
> Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed."

We submit that there has been presented but the one Federal question and that we should be permited to advance

as many reasons as we wish to sustain our position. The argument that the statute is violative of the due process clause of the Fourteenth Amendment in a procedural as distinguished from a substantive sense is but another ground or reason advanced to show its invalidity.

4. Appellee's Point that "The Requirements of Notice and Hearing are to be Implied from the Provisions of the Statute" is Not Well Taken

Appellee asserts (brief, p. 11) that under a rule prevailing in Kansas statutes which fail to provide for notice and an opportunity to be heard are only unconstitutional when by their terms they prohibit the interpolation of notice; and that when a statute permits such interpolation a requirement for notice may be implied. Appellee's contention is in direct conflict with numerous decisions of this Court, a number of which are cited in appellant's main brief.

Under the established rule of this Court the right to notice and hearing must be embodied in the statute itself, and it is insufficient that notice and a hearing be granted as a matter of grace or favor. The only case in this Court relied upon by appellee which has any possible bearing on this point is *Detroit Ry. Co.* v. *Osborn*, 189 U. S. 383, which held that where the objection that a statute does not provide for notice is taken for the first time in this Court, *and the record shows that notice was actually given*, it is not open to plaintiff in error to complain that the statute did not provide for such notice. This decision is without application here because the record does not show that notice was given or hearing held.

Practically all the Kansas cases cited by appellee in support of its contention on this point appear to involve the validity of tax assessments. The so-called "leading" case relied upon is *Gilmore County Clerk* v. *Hentig*, 33 Kan. 156.

The reason for the adoption of the rule is stated by the court below in the later case of *Hill* v. *Johnson County*, 82 Kan. 813 (cited by appellee at page 19 of its brief). Immediately following the statement quoted by appellee, the court used the following pertinent language (page 819):

> "In the opinion in *Railroad Company* v. *Abilene*, *supra*, it was said:
>
> 'Provision for notice and a hearing need not be made in the statute by express words. It may be implied. In reality the courts simply read the provision into the statute in order to uphold taxation schemes against the Fourteenth Amendment to the Constitution of the United States, which forbids any state to deprive any person of property without due process of law. This was done in the case of *Gilmore, County Clerk*, v. *Hentig*, 33 Kan. 156. * * * '"

The statute involved in *Tatlow* v. *Bacon*, 101 Kan. 26, cited on page 19 of appellee's brief, provided as follows:

> "An execution against the person of the debtor, except as prescribed in Section 511, can be issued only when the same is allowed by the supreme court, the district court, or any judge of either, upon being satisfied, by the affidavit of the judgment creditor or his attorney, and such other evidence as may be presented, of the existence of one or more of the particulars mentioned in Section 522." (Kansas Gen. Stat. 1915, Sec. 7415)

In commenting upon this statutory provision the court below said (page 28):

> "According to this provision a judicial hearing is contemplated, as the execution against the person cannot issue until a court or judge thereof shall determine upon evidence that the statutory grounds for such an order exist. It is not issued as a matter of course upon an application, but before making such order the su-

> preme court or the district court or a judge of either must be satisfied by the evidence presented in support of the application. The requirement that evidence shall be presented to the satisfaction of a court or judge clearly implies a hearing, and other provisions of the Code require notice of applications for an order of this kind."

The court below did not predicate its decision in *Railway Co.* v. *Railway Commissioner,* 85 Kan. 229 (cited on page 20 of appellee's brief), on this ground (implied notice). In its opinion (page 232), the court said:

> "However, it is not necessary to place the decision on either of the grounds mentioned, as complete statutory authority for the giving of notice to the railway companies appears to have been provided by the legislature, and also that in pursuance of that authority notice was in fact given."

In *Toombs* v. *Citizens Bank,* 281 U. S. 643, cited on page 21 of appellee's brief, the record showed that fifteen days' notice was actually given. Under these circumstances this Court said (page 647):

> "'In the face of this record, we cannot assume either that notice was not required by the law of the state or that that actually given was insufficient."

The case of *Paulson* v. *City of Portland,* 149 U. S. 30, cited on page 22 of appellee's brief, involved the validity of certain improvement taxes. The ordinance in question provided for the appointment of viewers to estimate the proportionate share of the cost which each parcel of property should bear. It named a place at which the viewers should meet, and directed them to hold stated meetings so that all interested persons might appear and be heard. The viewers gave notice by publication in the newspapers of the city of the time of their first meeting. Because of these

provisions of the ordinance and the fact that notice had actually been given the ordinance was upheld.

The case of *St. Louis S. W. R. Co.* v. *Arkansas*, 235 U. S. 350, 369, from which appellee quoted on page 21 of its brief, is not analogous. The statute there involved provided that for failure to pay a franchise tax a foreign corporation would forfeit its right to do business in the State. This Court said that in order to hold the act constitutional, until the State held otherwise, it would assume that the forfeiture applied only to the doing of intrastate business and would not assume in advance that the State would attempt to forfeit the right of the railroad to carry on its business in interstate commerce for failure to pay the tax.

The remaining cases cited by appellee have no possible application and lend no support to its contention.

5. The Statute Does Not Provide for Judicial Review of the Action of the Commission

Appellee argues that under the provisions of section 3 of the act (printed as an appendix to its brief) judicial review of the commission's orders is provided for, and that the court below in an earlier case has so held. (Brief, p. 25) Said section has no application or relation to the authority of the Commission to require the removal of transmission lines located upon private property intersected by newly projected state highways. It has reference only to substantial changes *in the state highway system* and provides that changes therein shall only be made when public safety shall require. The several cases cited and discussed by appellee deal with the question of the necessity for making substantial changes in the existing highway system and hold that a judicial review of the commission's decision on the question of the necessity for such changes is authorized. They have no bearing whatever upon the question of mak-

ing changes in existing private property encountered in the construction of new highways.

We are not here concerned with the necessity for changes in the highway system. The propriety of building the new highways is not questioned. The thing of which appellant complains is that in carrying out its program for new highways appellee undertakes to confiscate and take its property without compensation.

Appellant is not asking this Court for an interpretation of the challenged statute as stated by appellee. (Brief, p. 30.) That has been done by the court below. The matter presented to this Court is whether the statute as construed is violative of appellant's constitutional rights. That the construction placed upon the statute operates to take private property without compensation is not questioned. That it is a taking without due process of law, we believe, has been clearly demonstrated.

6. Appellee's Contention that "Appellant Has in Fact Been Granted a Full and Complete Judicial Review" Is Untenable

Appellee argues that appellant was granted a full and complete judicial review in the court below. As already stated, the action in the lower court was a mandamus proceeding to compel the performance of an act which appellee claimed the law enjoined as a duty. Appellee contended that its order and requirement was authorized under the terms of the challenged statute. Appellant defended upon the ground that the order and the statute were violative of its constitutional rights.

The statute does not provide for a review of the commission's order by any court—no right of appeal, certiorari, writ of error, or other mode of review is granted.

As stated above a mandamus action was brought by appellee to enforce its order. An alternative writ was served

upon appellant requiring it to proceed forthwith to make the changes in its lines "in accordance with the orders, plans and specifications adopted and approved by the state highway commission for the improvement of the highways therein referred to, or to show cause, on or before the 25th day of January, 1934, why the same should not be done." (R. 6) Such a proceeding does not constitute a hearing or judicial review of the commission's order.

Particularly applicable is the case of *Chicago, Burlington and Quincy Railroad Company* v. *Chicago*, 166 U. S. 226, 236, wherein this Court, speaking through Mr. Justice Harlan, said:

> "But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. *Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice.* Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." (Italic ours)

The following language of Mr. Justice McReynolds in *Ohio Valley Company* v. *Ben Avon Borough*, 253 U. S. 287, 289, (dealing with a statute for the fixing of public utility rates by a commission) is equally applicable here:

> "In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

7. Appellee's Claim that "The Statute Is a Valid Delegation of the Police Power" Is Not Justified

Under this heading appellee seeks to justify the decision of the court below on the authority of certain decisions of this Court. However, none of these cases involved the question of confiscation or taking of property located on private rights of way. For example, in the case of *New Orleans Gas Light Company* v. *Drainage Commission*, 197 U. S. 453, which is typical of the cases upon which appellee relies, the transmission lines were laid in existing streets in the first instance and, of course, were subject to regulation in the interest of public health and safety.

We agree with appellee's statement on page 39 of its brief, that:

> "A railroad grade crossing presents an entirely different problem for public regulation than does a pipe line buried beneath the highway."

Being entirely different, it is obvious that the so-called grade crossing elimination cases upon which appellee and the court below relied have no application. Particularly are they inapplicable to a pipe line buried beneath the ground upon a private right of way.

Apparently the court below proceeded upon the assump-

tion that it was unnecessary for appellee to purchase or condemn appellant's right of way notwithstanding its priority was expressly alleged in the answer and admitted by appellee's motion for judgment on the pleadings. In its opinion the court said:

> "With route fixed, right of way procured, plans adopted, and the highway commission engaged in executing them, the new and widened highways are, for all purposes of the act, established and existing highways, upon which the pipe line company maintains its pipe lines, and location of the pipe lines is subject to regulation by the highway commission." (R. 27)

The distinction between *police power* and *eminent domain* is pointed out in 12 *Corpus Juris* at page 905, where it is said:

> "The police power is to be clearly distinguished from the right of eminent domain; and the distinction lies in this, that in the exercise of the latter right private property is taken for public use and the owner is invariably entitled to compensation therefor, while the police power is usually exerted merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, it is not taken for public use, but rather destroyed in order to promote the general welfare of the public, and in neither case is the owner entitled to any compensation for any injury which he may sustain in consequence thereof, for the law considers that either the injury is damnum absque injuria or the owner is sufficiently compensated by sharing in the general benefits resulting from the exercise of the police power."

On page 15 of its brief appellee states that in the court below appellant's argument was based upon a confusion of the rights and duties of the parties in an action under the police power and one under the right of eminent domain. The confusion was on the part of the appellee and

has been carried into the decision of the lower court. In its opinion the court said (R. 21):

> "What the highway commission seeks to do is to execute the police power of the state to make public travel on the highways safe."

The prime error of the court below lies in the unwarranted assumption that appellant's transmission lines are on the highways and thus subject to regulation under the police power, when, as a matter of fact, they are on private easements which have not been dedicated to highway uses either by grant or condemnation. The appropriation of these easements and the lines located thereon to highway uses without first purchasing or condemning them cannot be accomplished under the guise of the police power. The fact that the easements are not wholly destroyed, but merely impaired to the extent that appellant loses its right of dominion over them and is required to expend a minimum of $5,460.00 in order that it may continue to use them for its purposes, does not change the rule of law that "private property may not be taken for a public use without compensation."

A forceful answer to appellee's contention that appellant's property may be taken without compensation under the police power is contained in the case of *Chicago, B. & Q. R. Co.* v. *Public Utilities Commission,* 69 Colo. 275, 276-279, 193 Pac. 726, 728-729, wherein the court said:

> "The question for determination in this case is as to the right of the Public Utilities Commission, by an order, without any proceeding in condemnation, to open a street across a railroad right of way.
>
> The argument of counsel for the respondent is, in brief, as follows:
>
> The state has delegated to the commission a part of the police power, that is, the right to regulate rail-

road companies in various matters, including the putting in of street crossings, etc.

That being so, the order to put in a crossing is within the authority of the commission and the order should be affirmed.

The defect in this argument is due to a failure to distinguish between the police power, and the right of eminent domain; between the power to compel the installation of crossings, and the power to take land for streets, or other public purposes.

A crossing may be ordered put in under the police power of the state; land may be taken for a street only by the exercise of the right of eminent domain.

Throughout the brief for respondent, this misapprehension appears. Cases are cited to the effect that crossings may be ordered in, at the expense of the railroad companies, and that uncompensated obedience to a regulation, enacted for the public safety under the police power of the state, is not a taking of property without just compensation; with all of which we agree. *Those cases have, however, no bearing on the question at issue.* Indeed, the commission seems to have first fallen into this error of supposing that the power to require the construction of crossings was equivalent to the power to take land for a roadway across the tracks.

* * * * * * *

It is manifest, then, that the discussion of the police power is wholly beside the mark. No case is cited, and we find none, which supports the contention of counsel.

* * * * * * *

The fact that property may be damaged or destroyed, without compensation, under the police power, has no bearing upon this controversy. Here the property is to be *taken* and devoted to a public use, the railroad company retaining a right to its use,

qualified by the right of the public to a new use. Property consists not in the thing said to be owned, but in the right to dominion over it, control of its use, and disposition. The thing owned may be tangible or intangible, a fee in land or an easement in it. A railroad company across whose tracks a street is opened loses the exclusive control,—which is property,—over the part devoted to street purposes, and hence a part of its property is 'taken.' Its right to compensation for that part is a natural right, protected by express constitutional provisions. Such is the declaration of the United States Supreme Court in the case last cited." [*C., B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226.] (Italics ours)

In *Pennsylvania Coal Company* v. *Mahon,* 260 U. S. 393, 413, this Court, speaking through Mr. Justice Holmes, said:

"As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."

Had the highway commission condemned or acquired from the appellant the right to construct the highways over and across its rights of way and permanent structures, we might be able to understand the conclusion that these lines are located upon established and existing highways, and thus perhaps subject to reasonable regulation under the police power. But this it did not do. It was claimed by appellee, and was so held by the court, that since new or different rights of way need not be procured by appellant, appellee could occupy the same and compel the changes in

appellant's structures without compensation. This contention and holding is decisively answered by the following language of this Court in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 410:

> "If the state were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value?"

Appellant has never contended that the state may not delegate its police power to an administrative agency to regulate in a reasonable manner transmission lines laid in or upon existing streets or highways. However, that is not the question here. In this case the lines are not laid upon public highways but on private property. This property has not been conveyed to the state either by grant or condemnation. What the commission seeks to do is to take this property under the guise of the police power without compensation. Until such time as the state has acquired a right and title superior and paramount to that of the pipe line company, its right to construct a highway across this land is subject and inferior to appellant's right to maintain and operate its established transmission lines.

The proposition is advanced by appellee, and apparently followed by the court below, that notwithstanding the seeming lack of due process of law and the apparent clash with the Fourteenth Amendment, the challenged statute was enacted, and the appellee is proceeding, under the police power of the state, and therefore the statute and order are

not subject to the standards applicable to legislation under other powers. The contention conflicts with the firmly established rule that "every state power is limited by the inhibitions of the Fourteenth Amendment." (*Southern Ry. Co.* v. *Virginia, supra*)

Appellant's transmission lines are not a nuisance subject to summary abatement by the state. The distinction is pointed out in *Mugler* v. *Kansas*, 123 U. S. 623, 669, where this Court said:

> "The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."

The observation of Mr. Justice McReynolds in *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240, is sharply applicable to the facts in this case:

> "Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

In *Olson v. United States*, 292 U. S. 246, 254-5 this Court said:

> "The statement in that opinion [*Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326] that 'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner' aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes."

In *Columbus Gas Co.* v. *Comm'n.*, 292 U. S. 398, 404, Mr. Justice Cardozo said:

> "It [the state court] put its judgment upon the ground that the statute of Ohio defining the powers of the Commission and the method of appraisal makes no provision for depletion (Ohio General Code, Sec. 499-9 to 499-13), and that the statute, and nothing else, gives the applicable rule. We may assume in submission to the holding of that court that the amortization allowance must be rejected if the rate making process is to conform to the rule prescribed by statute, irrespective of any other. That assumption being made, the conclusion does not follow that the statutory procedure may set at naught restrictions imposed upon the states and upon all their governmental organs by the Constitution of the nation."

In its main brief (page 43) appellant cited, without extended discussion, among other decisions of this Court, the case of *Yick Wo* v. *Hopkins,* 118 U. S. 356. We believe the rule of that case is particularly applicable to this one. There this Court held an ordinance of the city of San Francisco void because it conferred upon an administrative board arbitrary power without prescribing a yardstick by which the power may be limited.

Under the challenged statute, as construed, the highway commission may order and require the removal and relocation of transmission lines at the owner's expense, even though they be located upon private property. The commission's order may be with or without assigned cause or reason. Since the statute makes no provision for notice, hearing, or review, and prescribes no standard, rule or yardstick for the guidance of the commission, it clearly falls within the rule of Yick Wo and analogous cases. It is apparent that the statute undertakes to delegate naked arbitrary power upon the appellee.

Conclusion

Apellant concludes, as in its main brief, that the challenged statute, as construed by the court below, and the order of the highway commission made thereunder, unconstitutionally takes its property for a public use without compensation and without due process of law.

Respectfully submitted,

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Kansas City, Missouri,
February 5, 1935.

(5934-C)